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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

ROBERT L. HICKS, *Petitioner,*

v.

ORVILLE FREEMAN, Secretary of Agriculture of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on June 27, 1968, and the order filed September 6, 1968, by the Court of Appeals denying the petition for rehearing.

CITATION TO OPINIONS BELOW

The judgment of the United States District Court is reported in 273 Federal Supplement 334 (M.D.N.C. 1967) and is printed in Appendix A hereto. The judgment of the Court of Appeals was reported in 397 F. 2d 193 (1968) and is printed in Appendix B hereto, together with the unreported order denying the petition for rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1968. Thereafter a petition for rehearing was filed, which was denied by the Court of Appeals in an order filed on September 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

In furloughing a career Federal employee without pay during a reduction in force, must the Secretary of Agriculture follow statutory criteria of seniority and veterans' preference?

In furloughing a career Federal employee without pay during a reduction in force, must the Secretary of Agriculture abide by the applicable regulations which the Civil Service Commission has promulgated?

Does the Federal Register Act require that Federal employees be given notice of directives or Manuals which substantially abridge their employment rights?

Was the Secretary of Agriculture free unilaterally to reduce the petitioner's compensation when his rate of compensation had been assured to petitioner by the agreement under which he had been employed for ten years as a Federal tobacco inspector?

In view of the acts and representations of departmental officials on which petitioner had relied reasonably and in good faith for more than ten years was the Secretary of Agriculture estopped from reducing his compensation?

May action of the Secretary of Agriculture be sustained as discretionary when no discretion was exercised and the action was predicated on the Secretary's misapprehension of his own authority?

Was the Secretary of Agriculture free to ignore the requirements of an Employee-Management Cooperation Agreement which had been entered into between his Department and the Federal Tobacco Inspectors Mutual Association?

STATUTES AND REGULATIONS

5 U.S.C. Section 3502:

> "(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—
>
> (1) tenure of employment;
>
> (2) military preference, subject to section 3501 (a) (3) of this title;
>
> (3) length of service; and
>
> (4) efficiency or performance ratings."

5 U.S.C. Section 5596:

> "(b) An employee . . . who, . . . is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action . . . .
>
> (1) is entitled . . . to receive for the period for which the personnel action was in effect an amount

equal to all or any part of the pay, allowances or differentials, as applicable, that the employee normally would have earned . . . less any amounts he earned through other employment during that period; and

(2) for all purposes, is deemed to have performed service . . . during that period . . . ."

5 C.F.R. Sections 351.201-351.608 (Appendix C).

STATEMENT

The petitioner, a disabled veteran, was appointed by the United States Department of Agriculture as a tobacco inspector in August 1955. The duties of an inspector involve the grading of tobacco offered for auction on the warehouse floor; and this grade helps determine the price at which the tobacco is ultimately sold.

Prior to his appointment, the petitioner had been interviewed in Raleigh, North Carolina, in the Office of the Flue-Cured District Supervisor, who was the departmental official having authority over all inspectors grading flue-cured tobacco. At this time the terms of his employment were explained to him. Those terms were that during his initial probationary season, he would receive six months' salary for his work on the tobacco markets and thereafter, if he qualified to grade two types of flue-cured tobacco, he was to receive a minimum of eight months' pay in whatever civil service grade he might then hold. This had apparently been the method of compensating tobacco inspectors since at least 1946. (See Footnote 2 to District Court Opinion, Appendix A). "Apparently, the combination of the unpredictability of market dates and the neces-

sity to provide higher pay to attract competent inspectors led to this unusual arrangement." (Footnote 1 to Court of Appeals opinion, Appendix B).

After entering employment in reliance upon the stated terms, petitioner was paid during his first year at a rate equivalent to a GS-5 rating. Then in August 1956 he was classified as a "career competitive" employee and given a rating of GS-7; and in July 1960 he was promoted to GS-9. At the time of both of these promotions, his Personnel Form 52 stated that his employment would be for "six months or more a year on a continuing basis". Until 1966 petitioner worked on the tobacco markets an average of about five months a year; but, in accord with the terms of his employment, he was in a pay status for approximately eight months. For the remaining four months of each year he was furloughed.

Since he was in a pay status for each of these years, the petitioner also received a full year of service for retirement purposes. A Federal employee who is employed for six months or more a year is credited with a full year of service for retirement purposes; a person employed for less than six months receives credit for less than a full year. (See Footnote 2, Court of Appeals Opinion, Appendix B).

On November 1, 1965, the Director of the Tobacco Division issued a directive which discontinued for future years the policy of assuring tobacco inspectors a minimum period of pay status. Thenceforth inspectors would be paid only for the period actually worked, so that, in effect, their compensation in 1966 and subsequent years would be less for the same amount of tobacco grading.

The Federal Tobacco Inspectors Mutual Association was advised late in October 1965 of the impending directive. However, there was no negotiation between the Department and the Association with respect to this change in tours of paid employment, even though the Association and the Department had previously entered into an Employee-Management Cooperation Agreement pursuant to Executive Order 10,988.

On August 3, 1966, the petitioner filed his complaint in the District Court for the Middle District of North Carolina; and he prayed that the Secretary of Agriculture be directed to continue him in his previous employment and compensation status and be enjoined from interfering with his employment or his civil service rights. Jurisdiction was based on the existence of a federal question and was invoked pursuant to 28 U.S.C. Sections 1361, 1391, 5 U.S.C. Sections 631 et seq. (now 5 U.S.C. Sections 3301 et seq.), Sections 851 et seq. (now 5 U.S.C. Sections 1302 et seq.), and 7 U.S.C. Sections 511 et seq.

After the action had been filed, petitioner was furloughed without pay on December 12, 1966. However, as was specifically stipulated at the trial, other tobacco inspectors who were non-veterans and who had less seniority than the petitioner continued to receive employment after his furlough without pay. Accordingly, petitioner amended his complaint to allege that a furlough had been undertaken in violation of his employment contract, his retention rights as a career Federal employee, and the Cooperation Agreement between his Association and the Department.

After hearing evidence in this "rather novel case," (See Appendix A) the District Court ruled that the petitioner had failed to establish his right to con-

tinued compensation on the earlier basis of eight months' wages for fewer than six months' work on the tobacco markets, that the Employee-Management Cooperation Agreement does not bestow any rights to negotiation that were violated by the Secretary, and that the reduction in force procedures prescribed in the Code of Federal Regulations were not relevant to the Department's change in policy.

An appeal was taken to the Court of Appeals for the Fourth Circuit, which ruled that no contract of employment had been established, that the elements of estoppel were lacking, that negotiation was not required under the Cooperation Agreement, and that the petitioner was excepted from the reduction in force procedures because of an exception for seasonal employees in the Civil Service Commission Federal Personnel Manual and the Department of Agriculture Regulations, even though these documents had not been filed with the Federal Register nor published in the Code of Federal Regulations. A petition for rehearing was denied.

ARGUMENT FOR ALLOWING THE WRIT

The questions presented in this case focus on the basic issue of the standard of fairness that the Federal Government and its officials must conform to in dealing with its own employees. However, some of the policy considerations go far beyond the field of personnel rights; and present such fundamental issues as these: To what extent is the Federal Government subject to the doctrine of estoppel? May important rights be destroyed by Federal directives of which no one has notice? May action be upheld as a proper exercise of agency discretion when it is clear that no

discretion was exercised? These issues will become more apparent in connection with the discussion of the reasons for allowing the writ.

A. The Petition Should Be Allowed in Order To Review Departmental Defiance of Statutory Requirements and Federal Regulations

The applicable decisions of this Honorable Court make it clear that the Government can bind itself by the regulations which it promulgates, whether with respect to the discharge of Federal employees, *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957), or in other matters. *United States ex rel Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954). The lower Federal courts have often applied this principle. *See McKay* v. *Wahlenmaier,* 226 F. 2d 35 (D.C. Cir. 1955); *Ingalls* v. *Zuckert,* 309 F. 2d 659 (D.C. Cir. 1962); *Roberts* v. *Vance,* 343 F. 2d 236 (D.C. Cir. 1964).

Contrary to this well-established doctrine, the Court of Appeals in the present case has upheld the furlough without pay of a career employee which clearly violated a Federal statute and the regulations prescribed pursuant thereto. The statute, 5 U.S.C. Section 3502, provides that the Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to tenure of employment, military preference, length of service, and efficiency or performance ratings.

According to the undisputed evidence, the petitioner was a combat-disabled veteran—sometimes referred to as a "ten-point" veteran. He had been classified as a "career competitive" employee and placed in tenure group I—the tenure group for those Federal career

employees with the highest retention preference. Even so, he was furloughed without pay as part of a general reduction of periods of employment for Federal tobacco inspectors, while other inspectors with less service and with no veterans' preference were retained on duty—as was stipulated at the trial. The respondent's sole witness testified that no consideration was given to veterans' status or length of service in determining which inspectors should be furloughed first and which should be retained the longest.

For some reason the petitioner, who had filed suit against the respondent, was one of the very first inspectors to be furloughed in the fall of 1966. Thus, his compensation was substantially reduced from what it had been in prior years and from what it would have been had he been retained at work on the tobacco markets that were still open in December 1966 and in early 1967, while other inspectors with less seniority and with no veterans' preference were furloughed. Under these circumstances the respondent had violated 5 U.S.C. Section 3502.

In any event, the Federal regulations dealing with Reduction in Force and prescribed by the Civil Service Commission pursuant to 5 U.S.C. Section 3502 had the force of law. Cf. *Paul* v. *United States,* 371 U.S. 245, 255 (1963). And, as earlier noted, they are binding on the Federal Government even though promulgated by an agency of that same Government.

These regulations, contained in Part 351 of 5 Code of Federal Regulations, were clearly applicable to the petitioner's furlough without pay. 5 C.F.R. Section 351.201(a) provides that the reduction in force procedures shall apply to a competing employee who is

released from his competitive level by "furlough for more than 30 days". The petitioner was furloughed without pay for several months—far more than the thirty days required by this section. He was a "competing employee" since, according to all the evidence, he was an employee in tenure group I; and such an employee is specifically denominated a "competing employee" by 5 C.F.R. Section 351.203(a). The Court of Appeals believed that his status might be different because he was referred to in some personnel records as a "seasonal" employee. However, positions filled on a seasonal basis are also specifically included within the protection of the reduction in force procedures. See 5 C.F.R. Section 351.403. Those procedures include the establishment of a "retention register". 5 C.F.R. Section 351.404. Yet no such register was set up.

In concluding that the petitioner was not entitled to the benefits of reduction in force procedures, the Court of Appeals decided an important Federal question in conflict with the applicable decisions of this Honorable Court; it disregarded the well-established principles that no agency or department is free to defy applicable statutes and regulations promulgated pursuant to those statutes.

B. Agency Action May Not Be Upheld on the Basis of Directives That Have Not Been Published in the Federal Register

Despite the clear provisions of Part 351 of 5 C.F.R., the Court of Appeals concluded that petitioner was subject to an exception for seasonal employees made in the Civil Service Commission Federal Personnel Manual and in certain Department of Agriculture Regulations. In so doing, the Court ruled that these

documents were binding on the petitioner even though they had not been published in the Federal Register.

At the outset it is difficult to see how, even if properly published, these documents could overcome the effect of a Federal statute, 5 U.S.C. Section 3502, and of regulations issued pursuant thereto, which have the force of law. Moreover, their applicability to the petitioner might well be questioned, since the Department of Agriculture, which had classified the petitioner as a "career competitive" employee and placed him in tenure group I, should not be permitted to contend that, because he was "seasonal", petitioner lacked the safeguards available to other "career" employees.

However, it would be especially unfortunate if this Honorable Court failed to examine in this case the important question of the extent to which the Federal Government can bind its citizens by requirements of which it has given no fair notice. Certainly the decisions of this Honorable Court have made clear that in some instances Government cannot bind the citizen without giving him notice of its rules. *Lambert* v. *California,* 355 U.S. 225 (1957); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926).

In enacting the Freedom of Information Act, 5 U.S.C. Section 552, Congress also revealed its concern that citizens be kept informed of governmental procedures and rules. See generally Note, *Freedom of Information: The Statute and the Regulations,* 56 Georgetown L. J. 18 (1967). Thus, 5 U.S.C. Section 552(a) provides that, in the absence of actual notice, a person shall not be adversely affected by "a matter required to be published in the Federal Register and not so

published". It also prescribes the matters which must be published in the Federal Register for the guidance of the public.

In the case at bar, the respondent relied on two documents of uncertain vintage which had not been published in the Federal Register. These documents—the Federal Personnel Manual and the Department of Agriculture Regulations—purported to create an exception for seasonal employees, whereby they were removed from the reduction in force procedures provided in Part 351 of 5 C.F.R.

In giving effect to these two documents, the Court below adopted a restrictive interpretation of 5 U.S.C. Section 552; and thereby it severely limited the right of a Federal employee to know in advance the rules under which his employment and retention rights will be determined. Thus, the petitioner, a career employee relying on the rights supposedly provided him under the published regulations of the Civil Service Commission, learned that those rights had no substance because of "exceptions" contained in documents of which he had no actual or constructive notice.

Such a decision involves an important question which should now be decided by this Honorable Court. Indeed, it seems vital that this Court not delay in acting to avoid further attrition of safeguards contained in the Freedom of Information Act (5 U.S.C. Section 552)—safeguards which had their origins two decades earlier in the Administrative Procedure Act. See Act of June 11, 1946, ch. 324, § 3(a), 60 Stat. 238.

In this connection, it should be noted that the Federal Personnel Manual, relied on by the Court of Appeals, is a large volume which not only is not published

in the Federal Register or the Code of Federal Regulations but also is not readily available for consultation and is more in the form of a textbook than a regulation. Cf. *Manhat* v. *United States,* 220 F. 2d 143 (2d Cir. 1955), cert. denied, 349 U.S. 966 (1955); *United States* v. *Shick,* 7 U.S.C.M.A. 419, 22 C.M.R. 209 (1956). If this unpublished document can be the basis of curtailing the rights purportedly granted to Federal employees by statute and by published Civil Service Commission Regulations, then a vast wedge has been driven into the publication requirements of 5 U.S.C. Section 552(a).

C. The Respondent Was Not Free Unilaterally To Reduce Petitioner's Employment

The principle seems well-settled that, in the absence of some congressional limitation, the authority to contract "is no less than the general authority." See *Arizona* v. *California,* 373 U.S. 546, 580 (1963); *Mail Divisor Cases,* 251 U.S. 326, 329 (1920). There was no statutory requirement that the respondent and his predecessors contract with the petitioner on a special written contract form or in a special manner. Thus, when authorized departmental officials explained to petitioner his terms of employment, when he received a "career" appointment, and when his Personnel Form 52 contained repeated entries that petitioner's employment would be for "six months or more a year on a continuing basis," it would seem clear that an employment contract was entered into which extended beyond a particular year of employment. The word "continuing" must have some meaning. Moreover, it would hardly seem contemplated by the employment contract that the respondent could reduce petitioner's compen-

sation in 1966, 1967, and 1968 for performing the very same duties that he had performed in previous years.

In short, the respondent is seeking to repudiate his department's contract with the petitioner by contending that the Department of Agriculture had no obligation to provide petitioner any further employment. The Court of Appeals adopted this position as a premise for its argument; it reasoned that, since there was no obligation on petitioner's part to accept employment in future years, there was no obligation on the Government's part to provide him such employment. (See Appendix B). Thus, as there is no obligation to provide employment, the Department of Agriculture could reduce petitioner's compensation at will.

The defect in this syllogism is that the past decade of past service by petitioner, in return for the promise of "continuing" future employment, furnished good and valuable consideration for that promise. Thus, the respondent was not free to reduce petitioner's employment at will—without providing substitute employment or retraining. In taking a contrary position, the Court below rendered its decision in conflict with applicable decisions of this Honorable Court concerning Federal contracts; and for a Government employer it sanctioned a course of conduct that would have been a clear breach of contract if engaged in by any private employer.

Apart from his contract rights, the petitioner was entitled to the benefit of an estoppel. He had been dealt with and described by the Department as a "career" employee; and in reasonable reliance on the acts and representations of departmental officials, he had served as a Federal tobacco inspector for ten years.

The case for estoppel in behalf of the petitioner is far stronger than that which existed in *Semaan* v. *Mumford,* 335 F. 2d 704 (D.C. Cir. 1964)—a very similar Federal personnel case involving a discharged employee who was held entitled to claim an estoppel. There are other lower court cases which develop the same theme that the Government may be estopped by the acts of its officers and agents. See *e.g., United States* v. *Certain Parcels of Land,* 131 F. Supp. 65 (S.D. Cal. 1955); *Branch Banking & Trust Co.* v. *United States,* 120 Ct. Cl. 72, 98 F. Supp. 757 (Ct. Cl. 1951), *cert. denied,* 342 U.S. 893 (1951); *Walsonavich* v. *United States,* 335 F. 2d 96 (3rd Cir. 1964); *Krupp* v. *Federal Housing Administration,* 285 F. 2d 833 (1st Cir. 1961); and *United States* v. *Fox Lake State Bank,* 366 F. 2d 962 (7th Cir. 1966).

The decision of the Court of Appeals in the case at bar is clearly in conflict with the decision in *Semaan* v. *Mumford, supra,* which relates to the same general matter. Moreover, it is out of step with the various lower Federal court decisions that are expanding the estoppel concept. Under these circumstances, this Honorable Court should accept jurisdiction now to resolve the conflict.

D. Departmental Action Should Not Be Insulated by a Spurious Exercise of Discretion

Even in discretionary matters, a mistaken assumption as to an applicable legal rule will lead to reversal. See, *e.g., Perkins* v. *Elg,* 307 U.S. 325, 349-50 (1939); *U. S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 268 (1954); *Securities & Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80 (1943); *McGrath* v. *Kristensen,* 340 U.S. 162, 168-71 (1950). Failure

to exercise discretion because of an erroneous belief by the Government officials that he lacked such discretion is also reviewable. *Cotonificio Bustese, S.A.* v. *Morgenthau,* 121 F. 2d 884 (D.C. Cir. 1941).

In the case at bar, this principle has obvious applicability, as petitioner has repeatedly urged. The decision to reduce the periods of paid employment for tobacco inspectors resulted from the erroneous belief on the part of the respondent and his legal advisers that the arrangement which had been in effect for two decades was illegal. And yet, as the District Court concluded, the Secretary of Agriculture clearly had the requisite authority to enter into this pay arrangement with the inspectors. (See footnote 3 to District Court Opinion, Appendix A).

In short, the respondent unilaterally reduced the compensation of petitioner and his fellow inspectors because he erroneously believed that this was legally required. Thus, the reduction was premised on a legal error, rather than on an exercise of discretion; and under the decisions of this Honorable Court it was therefore invalid. The decision of the Court of Appeals was in conflict with these precedents; and so review is now warranted.

E. The Respondent Could Not Disregard the Applicable Employee-Management Cooperation Agreement

On January 17, 1962, President Kennedy issued Executive Order 10,988, 27 F.R. 551, which provided for Employee-Management Cooperation in the Federal Service. In a sense, this Executive Order marked the commencement of collective bargaining for Federal employees.

In accord with the procedures established by Executive Order 10,988, the Federal Tobacco Inspectors Mutual Association, of which petitioner was a member, entered into an Employee-Management Cooperation Agreement with the Department of Agriculture. On October 28, 1965, the Executive Committee of the Association was informed that the respondent's subordinates would soon issue a Directive that would reduce periods of paid employment for tobacco inspectors and would reduce their compensation for performing the same duties that they had performed in previous years. Thereafter the Directive was issued on November 1, 1965.

The District Court took the position that the Cooperation Agreement created no enforcible rights. (See District Court Opinion, Appendix A). The Court of Appeals, without passing on this point, concluded that the Agreement did not require "negotiations," as distinguished from "consultation." (Court of Appeals Opinion, Appendix B). The former position conflicts with the general presumption in favor of judicial review to protect important rights against invasion or disregard by an administrative agency. See *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Stark* v. *Wickard,* 321 U.S. 288 (1944); *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1902). The interpretation by the Court of Appeals conflicts with the purpose of the Executive Order under which the Cooperation Agreement was entered.

Apparently no case has yet been passed upon by this Honorable Court which fully presented the issue of the rights available to Federal employees under

Executive Order 10,988 or under any Cooperation Agreement entered pursuant thereto. And yet the ground rules for collective bargaining by Federal employees certainly merit judicial attention in view of the large number of persons affected thereby.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
M. D. NORTH CAROLINA,
DURHAM DIVISION.

ROBERT L. HICKS, *Plaintiff*,

v.

ORVILLE FREEMAN, Secretary of Agriculture of the United States of America, *Defendant*.

No. C-149-D-66.

Aug. 22, 1967

* * * * * * * * * *

Robinson O. Everett, of Everett, Everett & Everett, Durham, N. C., and William A. Creech, of Everett & Creech, Raleigh, N. C., for plaintiff.

William A. Gershuny, Atty., Dept. of Justice, Washington, D. C., and William H. Murdock, U. S. Atty., Greensboro, N. C., for defendant.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

GORDON, *District Judge*.

This is a rather novel case in which the plaintiff, a seasonal federal tobacco inspector, asks the Court to order the Secretary of Agriculture to continue to pay the plaintiff eight months' wages for five months' work as had been the practice for a number of years prior to a change in policy in 1965. For the reasons stated below, the relief which the plaintiff requests cannot be granted.

Jurisdiction is based on 28 U.S.C. § 1361 since this action is in the nature of mandamus to compel an officer of the

United States to perform a duty allegedly owed the plaintiff. Venue is based on 28 U.S.C. § 1391.

FINDINGS OF FACT

The facts of this case are not in substantial dispute. The essential facts are as follows:

1. Plaintiff, a ten point disabled veteran, was appointed by the United States Department of Agriculture as a tobacco grader or inspector in August, 1955.[1] The letter, dated July 7, 1955, advising plaintiff of his appointment, stated that:

> "Services can be used for approximately 6 months, then furloughed [sic] without pay until services needed again."

2. At the time of plaintiff's entry on duty, the Civil Service Commission announcement of his job stated that:

> "The salaries of persons who are employed in positions comparable to the GS-9 grade on a seasonal basis and who work for periods of 6 months or less during any 12-month period, may be fixed by the Secretary of Agriculture as provided in Section 14 of the Tobacco Inspection Act, approved August 23, 1935, and may, for such short seasons, be at rates higher than those specified above. * * * There are no higher rates of pay for the GS-5 or GS-7 grades. Appointments to all positions having a season longer than 6 months will be at the regular rates of pay indicated above."

Plaintiff's area supervisor had explained the terms of employment to plaintiff. Plaintiff understood that he was

---

[1] The duties of a tobacco inspector involve the grading of tobacco offered for auction on the warehouse floor. The grade the inspector gives the tobacco determines the price at which the government will purchase the tobacco if it is not sold at auction for an equivalent or higher price.

to be paid six months' salary for his work on the tobacco markets during his initial, probationary season. Thereafter, if plaintiff qualified to grade two types of flue-cured tobacco, he was to receive a minimum of eight months' pay for his work each market season.

3. Plaintiff received pay at a rate equivalent to a GS-5 rating for the first year while he was serving out his probationary period. In August, 1956, plaintiff was classified as a "career competitive seasonal" employee, given a wage rate of GS-7 and on his Form 52 from the Civil Service Commission it was stated that "Employment will be six months or more a year on a continuing basis."

4. On July 6, 1960, plaintiff was promoted to a GS-9 wage level. His Personnel Form 52 stated that he had

> "qualified for promotion by making an appropriate score in his practical test, and has served the required length of time. His name appears on Promotion Register No. 15-R, and is certified thereon as being one of the best qualified candidates. Employment is seasonal and will be six months or more a year on a continuing basis."

5. Until the 1966 season, plaintiff was in pay status for approximately eight months each year and was on furlough the remaining four months of the year, although he actually worked on an average only five months out of the eight months for which he was paid.[2] On November 1, 1965, the Director of the Tobacco Division of the United States Department of Agriculture informed the tobacco inspectors, including the plaintiff, that beginning with the 1966 season they would be paid only for the actual time

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[2] This had apparently been the method of compensation for tobacco Inspectors since at least 1946: all non-probationary tobacco Inspectors grading two types of flue-cured tobacco received a minimum of eight months' pay in their civil service grade per year.

they worked on the tobacco markets except for a short period at each end of the season for preparation and travel to and from the markets. As a result of this order, during the 1966 season, plaintiff was in pay status from July 20 until December 12, 1966, and thus was given five months' pay, for the five months that he actually worked, instead of the eight months' pay he had been receiving.

The plaintiff, therefore, brought this suit asking the Court to order the Secretary of Agriculture to reinstate plaintiff in his original status and position, and to pay plaintiff hereafter on the same basis as he had been paid in years past.

DISCUSSION

As the Court perceives the numerous arguments presented by the plaintiff, the plaintiff presents three basic theories upon which he posits his right to an order or writ of mandamus.[3]

They are as follows:

1. The first theory is that the terms of government employment cannot be changed at the will of an Executive Department head: that once a wage policy has been established and men have been hired and compensated on that basis for a number of years, the Department is estopped from changing its wage policy with regard to these men. The plaintiff argues that since the Department of Agriculture had paid tobacco inspectors eight months' wages for five months' work on the tobacco market each year,

[3] The extensive arguments concerning the authority of the Secretary of Agriculture to set wage policy as affected by the Tobacco Inspection Act of 1935, 7 U.S.C. § 511m, and the Classification Act of 1949, 5 U.S.C. § 1071, et seq., are omitted since it is believed that the former Act clearly granted the Secretary the requisite authority unimpeded by the latter Act, and that lengthy discussion of these Acts would only cloud the real issues.

and the plaintiff acted in reliance on this practice to take the job with the Department to his detriment, since plaintiff cannot now change jobs due to his age (46), lack of education, and disability, that the Secretary should now be estopped from changing the method of compensating the plaintiff.

2. The second theory the plaintiff asserts is that the furlough of tobacco inspectors at the end of the tobacco marketing season is a "reduction in force" within the meaning of the Civil Service Commission regulations, and that, therefore, the Department should have followed the procedures set out in these regulations before furloughing the plaintiff. Plaintiff asserts that this would cause him to be retained longer than some inspectors, who were furloughed later than the plaintiff, because he is a ten-point disabled veteran with twelve years of experience. The plaintiff seeks to have the Department ordered to use these procedures in furloughing him in the future.

3. Thirdly, the plaintiff claims that the "Employee-Management Cooperation Agreement" entered into between the Department of Agriculture as "Management" and the Federal Tobacco Inspector's Mutual Association as the "Union" had the binding force of a labor agreement, was violated by the Department's unilateral change of wage policy, and should be enforced against the Department.

The plaintiff cannot prevail under any of the asserted theories, and the relief requested cannot be granted.

The Estoppel Theory

Plaintiff asserts that the Secretary of Agriculture is estopped from changing the method used to compensate him by virtue of certain Civil Service Regulations, the assurances of Department personnel, the practices of the past, and the reliance by the plaintiff on these things to his detriment.

Certain cases are cited by plaintiff which stand for the proposition that the Secretary of an Executive Department must follow his own promulgated Regulations in discharging his employees.[4] These cases are not applicable to the case at bar for two reasons. Firstly, this is not a case involving the discharge of employees, but rather it is a case involving the method of compensation of retained employees. Secondly, the plaintiff has failed to show any relevant regulations promulgated by the Secretary of Agriculture or present in the Civil Service Regulations which have not been complied with.[5]

Other cases are cited by plaintiff which stand for the proposition that the Secretary of a Department can bind himself and the Government by other actions on his part—such as entering into a contract or making representations to others which induce detrimental reliance.[6] These cases, too, are wide of the mark. The plaintiff certainly was not employed on a contractual basis. No contract of employment has been introduced into the record or seriously contended to the Court in oral argument.

Admittedly, there were representations to the plaintiff about the methods to be used to compensate him. He was to be paid at a rate equivalent to the Civil Service ratings of GS-5, GS-7, or GS-9, depending on his experience and expertise. These representations have been fulfilled. The problem comes with the period during which these wages

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[4] Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).

[5] See discussion of the "reduction in force" theory, infra, p. 338.

[6] Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F. 2d 704 (1964); United States v. Certain Parcels of Land, 131 F. Supp. 65 (S.D. Cal. 1955); United States v. Fox Lake State Bank, 7 Cir., 366 F. 2d 962 (1966).

are to be paid. Although there was no explicit promise that he would be indefinitely paid eight months' salary for five months' work, the practice of the Department had been to do just that, and it was known to the plaintiff. However, this fact cannot be construed as a commitment by the Department to continue to follow this policy indefinitely.

The plaintiff's cases and arguments are not persuasive that the Department of Agriculture's abolition of old policies relating to inflated payments to seasonal workers is tainted with deceit, bad faith, or unfairness sufficient to justify an estoppel. It is abundantly reasonable that the doctrine of estoppel should be applied with great caution to the Government and its officials lest the Government be calcified into an arthritic body unable to cope with a changing reality.[7]

The Reduction in Force Theory

Plaintiff also asserts that the Department's change in the wage policy for tobacco inspectors effective for the 1966 season was, in effect, a "reduction in force" within the meaning of the Civil Service Regulations.[8] Section 201 of the relevant regulations governs when the reduction in force procedures are to be used:

> "REDUCTION IN FORCE. Subpart. B. General Provisions:
>
> Each agency shall follow this part when it releases a competing employee from his competitive level by separation, demotion, (or) furlough for more 30 days, * * * when the release is required because of a lack of work, or shortage of funds * * *."

Plaintiff argues that the change in his compensation time was a "release from his competitive level" within

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[7] Butler v. Commonwealth of Pennsylvania, 51 U.S. (10 How.) 402, 416, 13 L. Ed. 472, 478 (1850); Semaan v. Mumford, supra.

[8] 5 C.F.R. § 201 et seq.

the meaning of the section quoted, thus bringing the reduction in force procedures into effect. The Court cannot agree that plaintiff was "released from his competitive level" within the meaning of the Regulation. Plaintiff continues to compete at the GS-9 competitive level with the other tobacco inspectors at that grade level. Only the time during which he is to be paid has been changed, as it has for all tobacco inspectors regardless of their competitive level. No tobacco inspectors have been removed or released from their competitive level by this change in the compensation *time* of the tobacco inspectors. In fact, no reduction in work time is involved at all; only the pay time is changed.

The fact that he was furloughed for more than thirty days, or the remainder of the year after the end of the marketing season, is of no significance. If plaintiff had been the only inspector furloughed for more than thirty days, that might be a type of release from competitive level bringing the procedures into play, but all seasonal tobacco inspectors at plaintiff's competitive grade level are furloughed each year for more than thirty days. Yet, the reduction in force procedures have never been applied to tobacco inspectors, nor, to the knowledge of this Court, have the tobacco inspectors ever before complained of the Department's failure to use those procedures.

No merit is found in the plaintiff's reduction-in-force argument. Therefore, the Court does not consider the issue raised by the defendant of whether, in fact, the plaintiff was injured by the Department's failure to use the reduction-in-force procedures.

Violation of Employee-Management Agreement

The plaintiff also asserts that he is "entitled to seek redress for the violation of his rights" under the Employee-Management Cooperation Agreement, (hereafter the Agree-

ment), entered into between the Tobacco Division of the Department of Agriculture as "Management" and the Federal Tobacco Inspectors Association as the "Union."

This agreement was authorized by an Executive Order promulgated by President Kennedy which set Executive policy to encourage government employees to organize unions and to require certain agencies to consult with the unions "from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members."[9] President Kennedy ordered that "[t]he agency and such employee organization, through appropriate officials and representatives, shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements."[10] However, the order also stated:

> "In exercising authority to make rules and regulations relating to personnel policies and practices and working conditions, agencies shall have due regard for the obligation imposed by this section, but such obligation shall not be construed to extend to such areas of discretion and policy as the mission of the agency, its budget, its organization and the assignment of its personnel * * *."[11]

In response to this latter section, the Agreement at issue here contained the proviso that "Management officials

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[9] Executive Order No. 10988, Jan. 18, 1962, 27 F.R. 551, 5 U.S.C. § 631—Note, Section 5(b), p. 91. (See Manhattan-Bronx Postal Union v. Gronouski, 121 U.S. App. D.C. 321, 350 F. 2d 451 (1965); cert. den. 382 U.S. 978, 86 S. Ct. 548, 15 L. Ed. 2d 469, stating that this executive order created no judicially enforceable rights.)

[10] Id. p. 92, Section 6(b).

[11] Ibid.

of the agency retain the right, in accordance with applicable laws and regulations, * * * (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted * * *." [12]

It is apparent to the Court that the Department retained the right to change the compensation time of its seasonal employees by retaining the right to maintain the efficiency of and to determine the methods, means and personnel for the agency's operations.

Even if this Court were to find that this was not a retained right, the Agreement only imposed on the Agency the duty to "consult" with the Union, and thus, the plaintiff's only enforcible right would seem to be that the "Union" might get to "consult" somewhat further with the Department before the same result was obtained. The Court should not order the parties to do a futile thing.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the matter in controversy by virtue of 28 U.S.C. §§ 1361 and 1391.

2. Plaintiff has failed to establish any right to continue to be compensated on the old basis of eight months' wages for fewer than six months' work on the tobacco markets.

3. The "Employee-Management Cooperation Agreement" does not bestow any right to negotiate over wage rates and compensation time which was violated by the defendant.

4. The reduction in force procedures of 5 C.F.R. § 201 et seq. are not relevant to this change in policy by the Department of Agriculture.

5. Each party will bear his own cost.

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[12] Employee-Management Cooperation Agreement, § 1.6, p. 2.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

ROBERT L. HICKS, *Appellant,*

v.

ORVILLE FREEMAN, Secretary of Agriculture of the United States, *Appellee.*

No. 11866

Argued March 5, 1968

Decided June 27, 1968

* * * * * * * * * *

Robinson O. Everett, Durham, N. C. (William A. Creech, on the brief), for appellant.

Jack H. Weiner, Atty., Dept. of Justice (Edwin L. Weisl, Jr., Asst. Atty. Gen., and Morton Hollander, Atty., Dept. of Justice, and William H. Murdock, U. S. Atty., on the brief), for appellee.

Before SOBELOFF, BOREMAN and CRAVEN, Circuit Judges.

CRAVEN, Circuit Judge:

On November 1, 1965, the Director of the Tobacco Division of the Department of Agriculture issued a directive changing the method of compensation of tobacco inspectors. Robert L. Hicks, who was appointed a tobacco inspector in 1955, brought this action against the Secretary of Agriculture asserting that the change violated his contract of employment. Alternatively, plaintiff pleads estoppel of defendant by a course of conduct from showing the true nature of the contract, the provisions of an Employee-Management Cooperation Agreement, and violation of

regulatory procedures governing reduction of pay. It was adjudged in the district court that Hicks was entitled to no relief. We affirm.

Before Hicks accepted appointment in 1955, the Flue-Cured District Supervisor explained to him the terms of employment:

> During his initial probationary season, Hicks was to receive six months' salary irrespective of the number of days he actually worked on the tobacco markets.[1]
>
> Thereafter, if he qualified to grade two types of flue-cured tobacco (which he did), he would receive eight months' pay; if, in addition, he learned to grade burley tobacco (he did), he would be compensated for a nine-month period if called upon to work the burley market. Hicks testified that he accepted employment in reliance upon the Supervisor's statement of terms.

During his first year on the job, Hicks was paid at a rate equivalent to a GS-5 rating. In August 1956 he was classified as a "career competitive" employee and given a rating of GS-7; he was promoted to GS-9 in July 1960. At the time of both of these promotions, his Personnel Form 52 stated that his employment would be for "six months or more a year on a continuing basis."[2] Until 1966 Hicks worked on the markets an average of about five months a year, but he was in pay status for approximately eight months; for the remaining four months of each year he was furloughed.

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[1] Apparently, the combination of the unpredictability of market dates and the necessity to provide higher pay to attract competent inspectors led to this unusual arrangement.

[2] A Federal employee who is employed for six months or more a year is credited with a full year of service for retirement purposes; a person employed for less than six months receives credit for less than a full year.

On November 1, 1965, the policy of guaranteeing inspectors a minimum period of pay status was discontinued. Thereafter, according to the directive of the Director of the Tobacco Division, tobacco inspectors were to be paid only for time actually worked.[3] By a form letter dated May 19, 1966, all flue-cured personnel were asked to indicate whether they would be available for work or wished to submit their resignations. Hicks elected to return to work and was in pay status from July 20 to December 12, 1966. The defendant stipulated at trial that after Hicks was furloughed on December 12 other inspectors with less seniority were kept on duty and given further assignments on the burley market.

Clearly, no employment contract has been established that would obligate the Secretary to continue the practice of paying inspectors eight months' salary per annum for a lesser number of months worked. Hicks' evidence fails to establish even that he was bound to work for the Department of Agriculture more than one season at a time. It is hornbook law that a contract terminable at the will of one party is terminable at the will of the other; and "even where the employment is 'permanent' or 'for life' the majority of courts interpret this as being an agreement at will, terminable by either party at his election." 9 Williston, Contracts § 1017 at 131 (3d ed. 1967), and cases there cited. If the contract left the Secretary free to terminate Hicks' employment at the expiration of any season, a fortiori he was free each year to change the method of compensation even though it resulted in diminished pay. See Barnes v. United States, 150 F.Supp. 317, 138 Ct. Cl. 76 (1957).

The elements of estoppel are not present here. The only detriment that Hicks has suffered is in the mere passage

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[3] The policy had already been changed as to all new recruits in 1963.

of time his skills may have diminished in saleable value. Were this a sufficient basis alone for estoppel, few employees with a substantial amount of time on the job could be denied an equity-created tenure unavailable to them at law. Moreover, a "continuing" employment arrangement is not the same thing as a representation that the Government would never change the method of compensation. The latter promise is simply not established, nor may it be implied, we think, from defendant's course of conduct. Compare, Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F.2d 704 (D.C. Cir. 1964).

Hicks also complains that the directive of November 1 was promulgated in violation of the Employee-Management Cooperation Agreement entered into by the Secretary and the Federal Tobacco Inspectors Mutual Association. However, the Agreement specifically says, "Rates of pay or other conditions of employment specifically covered by Federal statute, Executive orders, rules and regulations are not subject to negotiation," but are permissible subjects for consultation. Employee-Management Cooperation Agreement § 4.2 (Oct. 21, 1965) (Emphasis added). Consultation is defined as "verbal or written discussion with employee representatives for the purpose of obtaining their views and/*or advising of intended actions* of concern to employees in the representation unit." Ibid. (Emphasis added). On October 28, 1965, representatives of the Department of Agriculture met with the Association's representatives and informed them of the pending directive. The Deputy Administrator for Marketing Services, who explained the directive, said, "We are instructed to tell you without equivocation that beginning July 1, 1966 new periods of employment for all seasonal tobacco inspectors will be in compliance with this directive. This directive comes from the Secretary. We have no choice in the matter. It is entirely out of our hands. There is no need to come back to us. Our hands are tied. This action was taken way above our heads." Minutes of Executive Committee Meeting with

Management, October 28, 1965, Plaintiff's Exhibit 7. Although we are quite convinced that such a statement is not commensurate with negotiation, within the language of the Agreement quoted above it is clearly consultation and all that the Agreement required of the Secretary.

Hicks' contention that the Secretary was required to follow standard reduction-in-force procedures in determining which inspectors were to be given further assignments on the burley market is, we think, equally unfounded. The Code of Federal Regulations purports to establish a procedure that an agency is required to follow "when it releases a competing employee from his competitive level by * * * furlough for more than thirty days." 5 C.F.R. § 351.201(a). However, an exception is made for *seasonal* employees in the Civil Service Commission Federal Personnel Manual, ch. 715, subchapter 3-3(d),[4] and the Department of Agriculture Regulations, ch. 35, subchapter 2-2d(2).[5] These documents are apparently not filed with the Federal Register nor are they published in C.F.R., but this fact does not limit their efficacy since reduction-in-force procedures are "related solely to * * * internal personnel rules and practices," 5 U.S.C.A. § 552(b), and "have no general applicability and legal effect." 44 U.S.C.A. § 305(a) Compare, United States v. Aarons, 310 F.2d 341 (2d Cir. 1962) with United States v. Hayes, 325 F.2d 307 (4th Cir. 1963).

Affirmed.

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[4] "Intermittent, seasonal, and part-time employees. Furlough does not apply to employees serving on an intermittent, seasonal, or part-time basis when the administrative action to relieve them from duty conforms to the conditions of employment established in their appointments." Ibid.

[5] "*Furloughs of seasonal employees.* Furloughs in excess of 30 days may be made without regard to reduction-in-force procedure for employees who were appointed on a seasonal basis when such seasonal limitation has been recorded on the personnel notification." Ibid.

Order Denying Petition for Rehearing

After careful consideration, it is adjudged that the appellant's petition for rehearing should be, and it hereby is, denied.

s/ SIMON E. SOBELOFF
United States Circuit Judge

s/ HERBERT S. BOREMAN
United States Circuit Judge

s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

APPENDIX C

PART 351—REDUCTION IN FORCE

Subpart A—[Reserved]

Subpart B—General Provisions

Sec.

351.201 Use of regulations.
351.202 Coverage.
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Subpart C—Transfer of Function

351.301 Transfer of employees.

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Subpart E—Retention Standing

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351.503 Length of service.
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351.801 Notice period.
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351.807 Status during notice period.

Subpart I—Appeals and Corrective Action

351.901 Initial appeals.
351.902 Agency action when Commission recommends corrective action.
351.903 Correction by agency.

Subpart J—Establishment and Maintenance of Reemployment Priority L[illegible]

351.1001 Establishment of list.

AUTHORITY: The provisions of this Part 351 issued under 5 U.S.C. 1302, 3501-3503, 7701, unless otherwise noted.

SOURCE: The provisions of this Part 351 appear at 28 F.R. 10062, Sept. 14, 1963, unless otherwise noted.

Subpart A—[Reserved]

Subpart B—General Provisions

§ 351.201 Use of regulations.

(a) Each agency shall follow this part when it releases a competing employee from his competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, or the exercise of reemployment rights or restoration rights.

(b) This part does not require an agency to fill a vacant position. However, when an agency, in its discretion, chooses to fill a vacancy by an employee who has been reached for release from his competitive level for one of the reasons named in paragraph (a) of this section, this part shall be followed.

(c) This part does not apply to the change of an employee from regular to substitute in the same pay level in the Post Office Department field service.

(d) An agency authorized to administer alien employee programs under section 6 of the Foreign Service Act Amendments of 1960 (74 Stat. 831; 22 U.S.C. 889) may include special plans for reduction in force in its alien employee programs. In these special plans an agency may give effect to the labor laws and practices of the locality of employment by supplementing the selection factors in Subparts D and E of this part to the extent consistent with the public interest. Subpart I of this part does not apply to actions taken under the special plans authorized by this paragraph.

§ 351.202 Coverage.

(a) Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

(1) The executive branch of the Federal Government,

(2) Those parts of the Federal Government outside the executive branch which are subject by statute to the competitive civil service requirements,

(3) The civil service of the government of the District of Columbia.

(b) This part does not apply to an employee:

(1) In a position in or under the legislative or judicial branch of the Federal Government, except an employee in a position subject by statute to the competitive civil service requirements, or

(2) Whose appointment is required by Congress to be confirmed by, or made with, the advice and consent of the United States Senate, except a postmaster.

§ 351.203 Definitions.

In this part:

(a) "Competing employee" means an employee in tenure group I, II, or III.

(b) "Days" means calendar days.

(c) "Function" means all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

(d) "Local commuting area" means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and reasonably can be expected to travel back and forth daily in their usual employment.

(e) "Obligated position" has the meaning given it in Part 300 of this chapter.

(f) "Performance rating" means the current official performance rating under a performance rating plan approved by the Commission.

(g) "Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

(h) "Representative rate" means the fourth step of the grade for a position under the Classification Act of 1949, as amended, the prevailing rate for a position under a wage-board or similar wage-determining procedure and, for other positions, the rate designated by the agency as representative of the position.

(i) "Transfer of function" means the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, or the movement of the competitive area in which the function is performed to another commuting area.

Subpart C—Transfer of Function

§ 351.301 Transfer of employees.

Before a reduction in force is made in connection with the transfer of any or all of the functions of an agency to another continuing agency, each competing employee in a position identified with the function or functions shall be transferred to the continuing agency without change in the tenure of his employment. An employee whose position is transferred solely for liquidation, and who is not identified with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days is not a competing employee for other positions in the receiving agency.

Subpart D—Scope of Competition

§ 351.401 Determining retention standing.

(a) Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§ 351.402 Competitive area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

(c) An agency may establish a competitive area larger than one that meets the standard named in paragraph (b) of this section. In exceptional circumstances, and with the prior approval of the Commission, an agency may establish a competitive area smaller than one that meets the standard named in paragraph (b) of this section.

(d) An agency may combine two or more competitive areas for initial competition in an enlarged competitive level or levels without correspondingly combining the areas for assignments between competitive levels. When an agency combines areas for initial competition only, it may limit competition for assignments between competitive levels to (1) the enlarged area, (2) a single competitive area, or (3) an area larger than a single area but smaller than the enlarged area.

§ 351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his ap-

pointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by the Commission.

(b) Each agency shall establish separate competitive levels for competitive positions as distinguished from excepted positions. Among competitive positions and among excepted positions, each agency shall establish separate competitive levels for positions:

(1) Under different pay schedules:

(2) Filled on a seasonal basis;

(3) Filled on a part-time basis;

(4) Filled on an intermittent basis.

In addition, among excepted positions, each agency shall establish separate competitive levels for positions filled under different appointment authorities.

§ 351.404 Retention register.

(a) Each agency shall establish a separate retention register from the current retention records of employees in each competitive level affected when a competing employee is to be released from a competitive level under this part.

(b) The agency shall enter on the retention register in the order of his retention standing the name of each competing employee in a competitive level (whether in duty, leave, or furlough status), except an employee on military duty with a restoration right.

(c) The agency shall enter on a list apart from the retention register the name and expiration date of the appointment of each employee serving in a position in the competitive level under specifically limited temporary appointment followed by the name of each employee serv-

ing in a position in the competitive level with a performance rating of less than "Satisfactory."

Subpart E—Retention Standing

§ 351.501 Tenure groups and sub-groups — competitive service.

(a) Each agency shall classify the competing employees on a retention register who occupy positions in the competitive service in the following groups and subgroups on the basis of tenure of employment and veteran preference. The descending order of retention standing:

(1) By groups is group I, group II, group III;

(2) Within each group is subgroup A, subgroup B; and

(3) Within each subgroup begins with the earliest service date.

(b) Group I includes each career employee who is not serving a probationary period. A career employee in an obligated position is in group I only when competing for positions at and below the grade in which he last served on a permanent basis.

(c) Group II includes each employee serving a probationary period, each career-conditional employee, and each career employee in an obligated position.

(d) Group III includes each indefinite employee, each employee serving under a temporary appointment pending establishment of register, each employee in status quo, and each employee serving under other nonstatus nontemporary appointment.

(e) Subgroup A includes each preference eligible employee.

(f) Subgroup B includes each nonpreference eligible employee.

§ 351.502 Tenure groups and sub-groups—excepted service.

Each agency shall classify the competing employees on a retention register who occupy positions in the excepted service by groups and subgroups that correspond to those for employees who occupy positions in the competitive service having similar tenure of employment and veteran preference, except that an employee who completes 1 year of current continuous service under a temporary appointment is in tenure group III.

§ 351.503 Length of service.

(a) Each agency shall establish a service date for each competing employee.

(b) An employee's service date is whichever of the following dates reflects his total creditable service and the performance rating credit in § 351.504: (1) his date of entrance on duty, when he has no previous creditable service; (2) the date obtained by substracting his total creditable previous service from the date he last entered on duty; or (3) the date obtained by subtracting from (1) or (2) the service equivalent allowed for a performance rating above "Satisfactory." Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

§ 351.504 Performance rating.

(a) Each agency shall credit each employee who has an "Outstanding" performance rating with 4 years of service added to his creditable service.

(b) Each agency shall credit each employee who has a performance rating between "Satisfactory" and "Outstanding," which has been authorized under a Performance Rating Plan approved by the Commission, with 2 years of service added to his creditable service.

§ 351.505 Records.

Each agency shall maintain the current, correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by:

(a) A representative of the Commission; and

(b) An employee of the agency to the extent that the registers and records have a bearing on his case.

The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

§ 351.506 Effective date of retention standing.

Except for the correction of an administrative error:

(a) The retention standing of each employee released from his competitive level in the order prescribed in § 351.602 is determined as of the date he is so released.

(b) The retention standing of each employee temporarily retained in his competitive level under § 351.608 is determined as of the date he would have been released from his competitive level had temporary retention action under § 351.608 not been taken. The retention standing of each employee so retained remains fixed until the completion of the reduction-in-force action which resulted in his temporary retention.

[30 F.R. 2397, Feb. 24, 1965]

Subpart F—Release From Competitive Level

§ 351.601 General.

An agency may not release a competing employee from a competitive level while retaining in that level an employee with a specifically limited temporary appointment or an "Unsatisfactory" performance rating. It may not release

a competing employee from a competitive level while retaining in that level an employee with lower retention standing, except as required under § 351.606 or § 351.806 or as permitted under §§ 351.607 and 351.608.

§ 351.602 Order of release from competitive level.

Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

§ 351.603 Actions.

Subject to Subpart G of this part, when an agency selects an employee for release from his competitive level, it shall:

(a) Assign him with his consent to a position for which he is qualified which will last at least 3 months;

(b) Furlough him; or

(c) Separate him.

§ 351.604 Use of furlough.

(a) An agency may furlough a competing employee only when it intends to recall him within 1 year to duty in the position from which furloughed.

(b) An agency may not separate a competing employee under this part while an employee with lower retention standing in the same competitive level is on furlough.

(c) An agency may not furlough a competing employee for more than 1 year.

(d) When an agency recalls employees to duty in the competitive level from which furloughed, it shall recall them in the order of their retention standing, beginning with the highest-standing employee.

§ 351.605 Liquidation provisions.

When an agency will abolish all positions in a competitive area within 3 months it shall release employees in subgroup order but may release them regardless of retention standing within a subgroup, except as provided in § 351.606. When an agency releases an employee under this section, the notice to the employee shall so state and also shall give the date the liquidation will be completed. An agency may apply §§ 351.607 and 351.608 in liquidation.

§ 351.606 Mandatory exceptions.

(a) When an agency applies § 351.602 or § 351.605, it shall give the following special retention priorities:

(1) Each group I or II preference eligible employee entitled under section 9 of the Universal Military Training and Service Act, as amended, to retention for 1 year after restoration shall be retained over other employees in his subgroup for the retention period; and

(2) Each group I or II nonpreference eligible employee entitled under section 9 of the Universal Military Training and Service Act, as amended, to retention for either 6 months or 1 year after restoration shall be retained over other employees in his subgroup for the retention period.

(b) Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the regular order of selection required by paragraph (a) of this section.

§ 351.607 Permissive continuing exceptions.

An agency may make exception to the selection sequence in § 351.602 and to the action provisions of § 351.603 when needed to retain an employee on duties that cannot be taken over within 90 days and without undue interruption to the activity by an employee with higher retention standing The agency shall notify in writing each higher-standing employee reached for released from the same competitive level of the reasons for the exception.

§ 351.608 Permissive temporary exceptions.

An agency may make exception for not more than 90 days to the selection sequence in § 351.602 and to the action provisions of § 351.603 when needed to retain an employee for 90 days or less after the effective date of release from the same competitive level of a higher-standing employee to continue an activity without undue interruption, or to satisfy a Government obligation to the retained employee, or when the temporary retention of the lower-standing employee does not adversely affect the rights of any higher-standing employee who is released ahead of him. The temporary retention of a lower-standing employee on sick leave as a permissive exception may exceed 90 days but may not exceed the date of exhaustion of his sick leave. When the agency retains an employee for more than 30 days after the effective date of release from the same competitive level of a higher-standing employee, it shall notify in writing each higher-standing employee of the reasons for the exception and the date the lower-standing employee's retention will end. When the agency retains a lower-standing employee for 30 days or less it shall list opposite his name on the retention register the reasons for the exception and the date his retention will end.

[30 F.R. 1173, Feb. 4, 1965]

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In the Supreme Court of the United States

~~ORVILLE FREEMAN~~

No. 805

ROBERT L. HICKS, PETITIONER

v.

ORVILLE FREEMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–10a) is reported at 273 F. Supp. 334. The opinion of the court of appeals (Pet. App. 11a–15a) is reported at 397 F. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1968. A timely petition for rehearing was denied on September 6, 1968. The petition for a writ of certiorari was filed on December 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the reduction-in-force procedures, applicable to the separation of Federal employees from their jobs, apply to the annual furloughing of seasonally employed tobacco graders.

2. Whether the Secretary of Agriculture was authorized by the Tobacco Inspection Act of 1935 to reexamine the method of compensating seasonal tobacco graders and to determine that the graders are to be compensated by the government only for those periods in which they actually work.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. 511m. Regulation; hearings; employees; expenditures; appropriations.

> The Secretary is authorized to make such rules and regulations and hold such hearings as he may deem necessary to effectuate the purposes of this chapter and may cooperate with any other Department or agency of the Government; any State, territory, district, or possession, or department, agency, or political subdivision thereof; purchasing and consuming organizations, boards of trade, chambers of commerce, or other associations of business men or trade organizations; or any person, whether operating in one or more jurisdictions in carrying on the work herein authorized; and he shall have the power to appoint, suspend, remove, and fix the compensation of all officers, employees, and licensees not in conflict with existing law. The Secretary is authorized to make such expenditures for rent outside of the District of Columbia, printing, binding, telegrams, telephones, books of reference, publications, furni-

ture, stationery, office and laboratory equipment, travel, tobacco for use in preparing and demonstrating standards, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for administering this chapter.

The Federal Personnel Manual of the United States Civil Service Commission provides as follows:

> FPM Supplement 990–2, Book 531, Subchapter S2–7(e). Pay for intermittent employment.
>
> There are no provisions in the Classification Act of 1949, as amended, nor in the Federal Employees' Pay Act of 1945, as amended, authorizing a full day's pay for services *less* than the length of the normal workday; nor is payment of compensation authorized for any number of hours less than those actually worked. Accordingly, it follows that, generally, the compensation of employees appointed on a when-actually-employed basis is determined in the same manner as that of full-time employees. Exceptions to the general rule occur in those instances when W.A.E. employees have no administratively established workweeks and perform services in excess of 40 hours per week for one or both of the weeks in the biweekly pay period. Such employees are entitled to *straight-time* compensation for all hours worked irrespective of whether services be performed in excess of 40 hours per week (34 Comp. Gen. 471. [Emphasis in the original.]

FPM—Chapter 715, Subchapter 3–3. Other Reasons for Nondisciplinary Actions.

Lack of funds or lack of work.

* * * * *

d. Intermittent, seasonal, and part-time employees.

Furlough does not apply to employees serving on an intermittent, seasonal, or part-time basis when the administrative action to relieve them from duty conforms to the conditions of employment established in their appointments.

The Administrative Regulations of the Department of Agriculture provide in pertinent part:

Chapter 351—Reduction in Force

* * * * *

Subchapter 2—General Provisions

* * * * *

(2) Furloughs of seasonal employees.

Furloughs in excess of 30 days may be made without regard to reduction-in-force procedure for employees who were appointed on a seasonal basis when such seasonal limitation has been recorded on the personnel notification.

STATEMENT

1. The petitioner was appointed by the United States Department of Agriculture as a tobacco grader or inspector in August 1955 (Pet. App. 2a). His duties involved the grading of tobacco offered for sale at auction. In accordance with the then-existing practice, through 1965 petitioner was kept in pay status for approximately eight months each year although "he actually worked on an average only five months

out of the eight months for which he was paid" (Pet. App. 3a).

In the interim, a Departmental audit of the Tobacco Division of the Consumer Marketing Service revealed that 38 percent of the Division's annual salary expenditure for tobacco graders was being spent in payment for time not actually worked by the graders (Tr. 204–205).[1] The Department accordingly determined that all inspectors hired after 1963 were to be advised each season as to the actual prospective work period and that their pay period would more closely conform to the actual time worked (Tr. 206). Thereafter, in 1965, the personal attention of the Secretary of Agriculture was directed to the practice of paying the tobacco graders eight months' pay for approximately five months' work (Tr. 206). After another investigation—revealing that the men were being paid even when the markets were closed and there was no work for them to do—the Secretary decided to terminate the practice (Tr. 207–208). The Department then determined to give the men notice that beginning with the July 1966 season the employment period would be changed to correspond with the actual working period (Tr. 210).

A meeting was held on October 28, 1965 (App. 166–168), between Department officials and the Executive Committee of the Federal Tobacco Inspectors Mutual Association, the union representing the inspectors. Three days later, on November 1, 1965, the Director

[1] "Tr." refers to the transcript of the district court proceedings on file with this Court. "App." refers to the Appendix to the brief which petitioner filed in the court of appeals, and which has been transmitted to this Court.

of the Tobacco Division put the new method of compensation into effect as of the next marketing season beginning in July 1966 (App. 172–173). Before the marketing season began, all personnel were questioned as to whether they wanted to return under the revised employment conditions (App. 136).

Petitioner returned to work on July 20, 1966 (App. 68). His work terminated on December 12, 1966 (App. 68). He was accordingly paid for the five months (10 pay periods) that he actually worked, instead of the eight months' pay (17½ pay periods) he had been receiving in previous years (App. 44, Tr. 234–236).[2]

2. Petitioner brought this mandamus proceeding to compel the Secretary of Agriculture to pay him eight months' wages for five months' work, as had been the practice prior to the change in policy in 1965 (App. 1–9, 14–15). After trial, the district court rejected all of the petitioner's contentions and entered judgment in favor of the Secretary (Pet. App. 1a–10a).

The court of appeals affirmed, ruling that: (1) no employment contract had been established that would obligate the Secretary to continue the practice of paying petitioner eight months' salary per year for five months' work, just as there was no contract binding petitioner to work for the Department of Agriculture more than one season; (2) the elements of an estoppel had not been established; (3) the Depart-

[2] In addition to his earnings from the Agriculture Department for 1966, petitioner estimated that his private real estate business grossed approximately "forty-two hundred dollars" in 1966 (Tr. 57).

ment did not violate the Employee-Management Cooperation Agreement, but rather acted in accordance with that Agreement by consulting with the union on this matter; (4) the Secretary was not required to follow reduction-in-force procedures in determining which inspectors were to be given further assignments on the burley-tobacco market, since federal regulations make a specific exception for seasonal employees (Pet. App. 11a–15a).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8–10), in determining which inspectors were to be given further assignments on the burley-tobacco market, the Secretary was not required to follow the detailed "reduction-in-force" procedures applicable to the separation of federal employees from their jobs.[3] Both the regulations of the Department of Agriculture and the Federal Personnel Manual of the Civil Service Commission, interpreting the Commission's regulations, clearly state that the reduction-in-force procedures are not applicable to seasonal employees such as petitioner. The Federal Personnel Manual says that

[3] Contrary to petitioner's suggestion (Pet. 10), he was not injured by the failure of the Department of Agriculture to establish a retention register. The Department selected 33 men for additional work in grading burley tobacco (Tr. 223). There were 83 veterans in the GS–9 level with more years of government service than petitioner; they would thus have been ahead of him had a reduction-in-force retention roster been established (Tr. 224, 225). Therefore, even if "reduction-in-force" procedures had been followed in the selection of graders in the burley market, petitioner would not have been selected.

"Furlough does not apply to employees serving on * * * seasonal, or part-time basis when the administrative action to relieve them from duty conforms to the conditions of employment established in their appointments." FPM Chapter 715, Subchapter 3–3d. And the Department of Agriculture Regulations specifically provide (Chapter 351, Subchapter 2, (2)):

> Furloughs in excess of 30 days may be made without regard to reduction-in-force procedure for employees who were appointed on a seasonal basis when such seasonal limitation has been recorded in the personnel notification.

Petitioner stresses (Pet. 11) that the Civil Service Commission Federal Personnel Manual and the Department of Agriculture Regulations are not published in the Federal Register, and apparently relies upon the publication requirements set forth in the Freedom of Information Act, 5 U.S.C. 552(a). But, as the court of appeals pointed out, these requirements are expressly inapplicable to regulations, such as those here, which relate "solely to * * * internal personnel rules and practices" (5 U.S.C. 552(b)).

2. Petitioner further asserts (Pet. 13–15) that the government was contractually obligated indefinitely to provide him with "'continuing' future employment" for periods in excess of his actual seasonal work periods. But the courts below correctly ruled that no such employment contract has been established. Nor is there any basis upon which the Secretary of Agriculture could be deemed estopped, as petitioner con-

tends (Pet. 14–15), from exercising his authority to adjust the pay period of seasonal tobacco graders to reflect the actual time worked.[4]

3. Petitioner's contention (Pet. 16) that the Secretary's action—in conforming petitioner's pay period to the time actually worked—was based on a legal error, rather than on an exercise of discretion, is baseless. The Secretary was plainly exercising the discretion granted to him under the Tobacco Inspection Act of 1935, which expressly provides that the Secretary "shall have the power to appoint, * * * and fix the compensation of all officers, employees, * * * not in conflict with existing law." 7 U.S.C. 511m.

4. Finally, petitioner contends (Pet. 16–18) that the Secretary of Agriculture's change of the compensation period violated collective bargaining rights established by the Employee-Management Cooperation Agreement. But, as the court below noted (Pet. App. 14a), the Employee-Management Cooperation Agreement expressly and specifically provides (¶4.2, App. 160):

> Rates of pay or other conditions of employment specifically covered by Federal statute,

[4] Contrary to petitioner's assertion, there is no conflict between the decision below and *Semaan* v. *Mumford*, 335 F. 2d 704 (C.A.D.C.), in which it was held that summary judgment had inappropriately been applied where there was an issue of fact as to whether a discharged employee was entitled to the administrative procedural safeguards governing the dismissal of "permanent" employees.

Executive Orders, rules and regulations are not subject to negotiation.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1969.

[5] Executive Order 10988 (discussed in Pet. 16–18), upon which the Agreement is based (App. 154), creates no judicially enforceable rights. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451 (C.A.D.C.), certiorari denied, 382 U.S. 978; *National Assoc. of Revenue Employees* v. *Dillon*, 356 F. 2d 811 (C.A.DC.).

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